93-509

No. _____

Supreme Court, U.S.
FILED
SEP 28 1993
OFFICE OF THE CLERK

— In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICK MARINO,

Petitioner,

v.

WRITERS' GUILD OF AMERICA, WEST, INC., FRANCIS F. COPPOLA AND MARIO PUZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an arbitration procedure violate the principle of fundamental fairness, or the Federal Arbitration Act, 9 U.S.C. § 10, where neither the identities of the arbitrators, nor the arbitrators' possible partiality or bias, nor the arbitrators' dealings with the parties, are disclosed to the parties to the arbitration?

2. Does an arbitration procedure violate the principle of fundamental fairness, or the Federal Arbitration Act, 9 U.S.C. § 10, where there is no hearing, no right to see or respond to adverse evidence, no right to offer relevant evidence, no right to see the instructions given to the arbitrators, and the arbitrators are not required to consider all of the evidence?

3. Does a labor union's duty of fair representation to its members obligate the union, in conducting arbitrations to which its members are required to submit disputes, to conduct fundamentally fair arbitrations, to refrain from discriminating against one of its members, and to follow its own rules?

4. Did the Ninth Circuit erroneously affirm summary judgment upholding an arbitration award on the ground that a party waived his objections to the arbitration procedure, where there is substantial evidence that it would have been futile for that party to object to the arbitration procedures in issue, and there is no evidence that the party failed to object to such procedures?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Nick Marino, and the respondents, Writers' Guild of America, West, Inc., Francis F. Coppola and Mario Puzo. The Writers' Guild of America, East, Inc. was named as a defendant in the district court, but was not served with process. Consequently, the Writers' Guild of America, East, Inc. is not a party to the judgment below, and is not named as a party herein.

The respondents before this Court are the Writers' Guild of America, West, Inc., Francis F. Coppola and Mario Puzo.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Nick Marino, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on May 12, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 992 F.2d 1480, and is reprinted in Appendix A, *infra*. The Statement of Uncontroverted Facts and Conclusions of Law of the United States District Court for the Central District of California (REA, D.J.) has not been reported. It is reprinted in Appendix B, *infra*.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a). On October 28, 1991, the district court granted the respondents' motion for summary judgment. *See* Appendix B, *infra*. On petitioner's appeal, the Ninth Circuit, on May 12, 1993, entered a judgment and an opinion affirming the judgment of the Central District. *See* Appendix A, *infra*. On May 27, 1993, petitioner timely filed a petition for rehearing. On June 30, 1993, the Ninth Circuit denied the petition for rehearing.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The following federal statute is relevant to the issues in this case: The Federal Arbitration Act, 9 U.S.C. § 10. Award of arbitrators; vacation; grounds; rehearing.

In either of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

I. *Introduction*

This action is to vacate an arbitration award of the screen credit for authorship of the motion picture "The Godfather Part III" ("Godfather III"). It challenges the unfair arbitration procedures involved, and the discriminatory conduct of the union which conducted the arbitration.

Petitioner Nick Marino ("Marino") is a motion picture writer, and is a member of respondent Writers' Guild of America, West, Inc. (the "WGA"). The WGA is a labor union representing writers in the motion picture and television industries, and is a signatory to a collective bargaining agreement (the "Minimum Basic Agreement" or "MBA") with various motion picture studios and production companies. Respondent Francis F. Coppola ("Coppola") is a motion picture writer, director and producer. Respondent Mario Puzo ("Puzo") is a motion picture writer and a novelist.

Pursuant to the MBA, the WGA conducts arbitrations for the award of screen credits for authorship of motion pictures. These awards are binding on the motion picture production companies who are signatories to the MBA. All WGA members are required to submit disputes concerning screen credits to these WGA arbitrations.

In 1985, Marino, together with a co-writer, wrote a treatment[1] for "Godfather III," which was purchased by Paramount Pictures Corporation ("Paramount"), a signatory to the MBA. Paramount then hired Marino to write a screenplay[2] based on the treatment. Marino wrote the screenplay, but Paramount chose not to produce it at that time. In 1987, Marino wrote a second treatment for "Godfather III," and sent it to executives at a production company owned by Coppola. In 1989 and 1990, Coppola and Puzo co-wrote a screenplay for "Godfather III." The motion picture was produced and completed in 1990. Paramount subsequently distributed "Godfather III" in various media throughout the world.

In 1990, the WGA conducted an arbitration to determine the screen credit for "Godfather III." Pursuant to that arbitration, the WGA awarded Coppola and Puzo the sole writing credit for the motion picture, and denied any credit to Marino.

II. *The WGA Arbitration Procedure*

The WGA's Screen Credits Manual contains the WGA's procedure for the arbitration of writers' screen

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[1] A motion picture treatment is an adaptation of literary or dramatic material for motion picture purposes in a form suitable for use as the basis of a screenplay.

[2] A motion picture screenplay is a final script with individual scenes, full dialogue and camera setups.

credits for theatrical motion pictures.[3] The WGA procedure provides no hearing, does not permit disclosure of the arbitrators' identities to the parties, causes the arbitrators to receive evidence *ex parte*, gives the arbitrators secret instructions, and precludes the parties from offering relevant evidence.

The WGA selects an arbitration committee, consisting of three WGA members, to make the credit determination. However, the WGA does not disclose to the parties the identities of the arbitrators or the arbitrators' dealings with the parties. Accordingly, the parties have no way to determine whether the arbitrators are properly qualified or whether they are partial or biased.[4]

The WGA provides each arbitrator with the following materials ("arbitration materials"): the writing credits as tentatively determined by the motion picture production company, arbitration statements submitted by the parties (and, possibly, by the motion picture production

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[3] If successive writers are employed on a single project, the credits are determined on the basis of the percentage of each writer's contribution to the final screenplay: A writer who contributes more than 33% of a screenplay based on source material such as the novel, "The Godfather," shall receive screenplay credit.

[4] The WGA does give writers an opportunity to review a list of potential arbitrators, and to peremptorily challenge a "reasonable number" of those potential arbitrators. However, the list contains over 1,600 names. According to the WGA's rules, a party has only 24 hours to make his or her challenges. Therefore, it is virtually impossible to review and research the qualifications, and the possible bias or partiality, of over 1,600 writers in connection with a WGA arbitration. As the Ninth Circuit wrote, "it may be well nigh impossible to ferret out possible bias in all of the persons on [the list]." *See* Appendix A, *page A10*.

company), a statement of the issues to be determined by the arbitrators formulated by the WGA's Arbitration Secretary ("instructions"), the literary material pertaining to the motion picture including the treatments and screenplays, and any other information deemed relevant to the controversy.

The WGA withholds much of the materials sent to the arbitrators from the participating writers. A writer cannot see any statements submitted by adverse parties or by the motion picture production company, the instructions formulated by the WGA's Arbitration Secretary, or other written material submitted to the arbitrators. Therefore, a writer cannot respond to, or correct, any erroneous or fraudulent statements made by the other parties, the motion picture production company, or the WGA.

Moreover, there is no hearing. Consequently, a writer has no way of knowing the basis on which the arbitrators make their decisions, or what evidence or standards they consider or use in order to do so.

Thus, the arbitration is conducted without any of the safeguards ordinarily associated with a fair adjudication: a hearing on the merits, disclosure of the evidence, confrontation of adverse parties, and impartiality of the individuals who determine the outcome of the dispute.

Furthermore, the WGA does not provide any meaningful review of the arbitrators' decision. Within twenty-four hours after the WGA notifies the parties of the decision, a party may request a review by a Policy Review Board consisting of members of the WGA Credits

Committee. However, the Policy Review Board's jurisdiction is strictly limited; it may consider only dereliction of duty by the arbitrators, undue influence upon the arbitrators, misinterpretation or misapplication of WGA policy, or important new evidence. Since the writer must make his or her appeal without any knowledge of anything that happened during the arbitration process, he or she has no way to determine the factual basis for any of the grounds upon which an appeal may be based. Moreover, the Policy Review Board cannot read the material involved, and cannot reverse the arbitrators' decisions in matters of judgment. Thus, the protesting writer has no effective or meaningful right of appeal.

The Screen Credits Manual provides that "at the request of any participating writer, the identity of all participating writers . . . shall not be told to the arbitration committee." Consequently, because Coppola and Puzo are well-known writers, and Marino and Wright are not, Marino and Wright requested that the WGA not reveal the identities of the participating writers to the arbitration committee. However, the Arbitration Secretary refused to maintain the anonymity of the participating writers, saying that Coppola had already submitted a statement identifying him as one of the writers of the final shooting script.

When the Arbitration Secretary sent the arbitration materials to the arbitrators, she omitted Marino's 1987 treatment. Marino requested, repeatedly, that the WGA include his 1987 treatment in the arbitration materials. However, the WGA refused to do so, stating that only

written materials which are subject to the MBA may be considered in a credit arbitration.[5]

The arbitration commenced on October 24, 1990. On November 5, 1990, the WGA informed Marino that the arbitrators had decided that Coppola and Puzo would receive sole writing credit for "Godfather III", and that Marino and Wright would receive no credit. Discovery in the action below revealed that two arbitrators voted in favor of the final result, and one arbitrator voted that Marino and Wright should receive a writing credit consisting of "Story by Nick Marino and Tom Wright." Although the WGA rules require that each arbitrator confirm his or her decision in writing, one of the two arbitrators who voted against Marino failed to do so.

Marino immediately requested a review by the WGA's Policy Review Board. Marino and Wright protested that the arbitration was unfair because, *inter alia*, the WGA would not divulge the identities of the arbitrators to them, and the WGA discriminated against them in conducting the arbitration. Because the WGA did not disclose any information concerning the arbitrators, the procedures they used, the evidence they reviewed, or how they interpreted or applied the WGA's policy, Marino and Wright had no

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[5] The MBA merely provides that any writer who has been employed by a producer on a story, or who has sold literary material subject to the MBA, shall be considered a participant in a credit arbitration. Here, since Marino was employed by Paramount, and sold his 1985 treatment to Paramount, he was considered a participant in the credit arbitration. Nothing in the MBA, or the Guild's rules, precludes a participant from offering evidence relevant to the credit determination in issue.

meaningful opportunity to present an appeal to the Policy Review Board.

Subsequently, members of the Policy Review Board telephoned the arbitrators to discuss the arbitration. The two arbitrators who voted against Marino conceded that they had not read all of the arbitration materials. Nevertheless, the WGA refused to order a new arbitration.

The law provides that Marino has a right to a fundamentally fair hearing and a right to be fairly represented by the WGA. However, the arbitration here was fundamentally unfair. Moreover, the WGA violated its duty of fair representation by discriminating against Marino, and by failing to follow its own rules providing for the anonymity of the writers involved in the arbitration and the submission of Marino's 1987 treatment.

For these reasons, summary judgment should be reversed, the case remanded for a trial on the merits, and the arbitration award vacated.

III. *The Action Below*

Marino filed this action in state court. The action was removed to the district court on the grounds that the proceedings were governed by a collective bargaining agreement and preempted by federal labor law. Marino and respondents (collectively) each filed motions for summary judgment. The district court granted respondents' motion for summary judgment, and denied Marino's motion. On October 25, 1991, the district court filed the Judgment herein.

Marino then filed an appeal to the Ninth Circuit, invoking jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit affirmed the judgment of the district court.

The Ninth Circuit recognized that arbitrations must be procedurally fair: "It is undoubtedly true that all notions of procedural fairness cannot be jettisoned simply because the parties have agreed to arbitrate." (Appendix A, page A7)

However, the Ninth Circuit did not base its decision on substantive issues of procedural fairness. Rather, the court held that Marino waived his claims relating to the anonymity of the arbitrators and the other issues of procedural fairness by failing to object before the arbitrators issued their award. The Ninth Circuit did not rely on, or refer to, any evidence on this issue (and the district court made no finding thereon). The court recognized that "[i]t may often be the case that a union member should simply go through the procedures, especially if no objection can possibly change them." Appendix A, page A13. Nevertheless, the court did not review or discuss any of the evidence concerning the lack of any opportunity to make objections, or the futility thereof.

The Ninth Circuit also recognized that the broad authority of a union as the exclusive agent in the administration of a collective bargaining agreement is accompanied by a responsibility of equal scope, i.e., the responsibility and duty of fair representation. (*See* Section III, *infra.*) However, the Ninth Circuit found that the

WGA did not breach its duty of fair representation for several reasons: first, Marino's procedural claims were waived. Second, Marino did not establish that the WGA's conduct was discriminatory, in bad faith or arbitrary. Third, as to the issue of two of the arbitrators' failure to review the evidence, the court found that nothing in the record indicated that the WGA's decision to accept the arbitrators' award was discriminatory, in bad faith, or arbitrary. The Ninth Circuit did not analyze the issue of the arbitrators' failure to read the evidence under the Federal Arbitration Act or the standard of fundamental fairness.

REASONS FOR GRANTING THE WRIT

I. *THE CURRENT PROLIFERATION OF LITIGATION REQUIRES THAT THE COURT DEVELOP AND ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION*

The federal courts are increasingly over-burdened; justice is increasingly threatened. *See* Rehnquist, C.J., *Seen In a Glass Darkly: The Future of the Federal Courts, 1993 WIS. L. REV. 1, 3 (1993).*

> "[I]f we merely proceed along the same path as we have for the last few decades, reacting piecemeal when problems become so overwhelming as to demand attention, we will soon end up with a system that serves neither its beneficiaries nor its participants very well. District courts will be characterized by more bureaucracy, less accountability, and less attention to individual cases. The queue for civil cases will get longer

> and longer because of the number of criminal cases demanding resources and attention. . . . The result will be a decline in the high quality of justice the nation has long expected of the federal courts." *Id.* at 3-4.

One solution is, as Abraham Lincoln said: "Discourage litigation." Burger, W., *American Law Institute Studies on Path to a "Better Way": Litigation alternatives, and Accommodation: Forward,* 1989 DUKE L.J.808 (1989).

An increasingly necessary component of discouraging litigation in federal courts is encouraging alternative dispute resolution. Thus, there is a profound need to develop methods of alternative dispute resolution. Rehnquist, C.J., *Tribute to Leo Levin*, 138 U.PA.L.REV. 317, 318 (1989). Two of the fundamental aspects of developing alternative dispute resolution are to ensure that the processes are just and to encourage potential litigants to employ these processes. The latter aspect relies, to a considerable extent, on the former. Potential litigants must believe that the processes are just before they will submit their disputes to such resolution. Conversely, if potential litigants have little faith in the fairness of alternate dispute resolution procedures, or if they perceive inherent dangers of bias or impartiality in those procedures, they will bring their grievances directly to the courthouse.

This case is about arbitration. If arbitration is to be an effective alternative to litigation in the federal courts, parties initially must believe in the system; then, they must

actually arbitrate their disputes, and still maintain their belief. It is essential, to foster that belief, that the arbitration procedures provide for a fair hearing on the merits[6].

Petitioner does not contend that arbitrations must include full trials pursuant to the rules of civil procedure. Indeed, that would defeat the very purpose of arbitration. However, arbitrations must be *fundamentally fair*, and must provide a minimum level of integrity.

The policy inherent in the Federal Arbitration Act, and in the legal precedents, is to encourage arbitration. But, as the Court stated in *Commonwealth Coatings Corporation v. Continental Casualty Company*, 393 U.S. 145, 147, 21 L.Ed.2d 301, 89 S.Ct. 337 (1968), the intent of the law is not merely to provide for *any* arbitration, but to provide for *impartial* arbitration.

Thus, the purpose of federal arbitration law is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 18 L.Ed.2d 1270, 87 S.Ct. 1801 (1967). "It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the 'power of the federal courts to enforce the terms of private agreements is at all times

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[6] *See Los Angeles Times, Auto Owners Want To Have Their Say In Arbitration*, article dated September 3, 1993. (A survey by the California Department of Consumer Affairs of 1,248 Californians who went through arbitration in new-car warranty disputes in 1992 shows that more than half felt the process was unfair. The question of fairness often goes directly to the opportunity to be heard.)

exercised subject to the restrictions and limitations of the public policy of the United States'." *Local 453, International Union of the Electrical, Radio & Machine Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963), *cert. denied*, 373 U.S. 949, 10 L.Ed.2d 704, 83 S.Ct. 1678 (1963), *quoting Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

Almost two decades ago, the Court stated that "Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimal levels of integrity." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572, 47 L.Ed.2d 231, 96 S.Ct. 1048 (1976). Unfortunately, since that time, the circuit courts have left the concept of what is fundamentally fair largely undefined, and they have provided no guidelines as to what constitute "minimum levels of integrity." Thus, although it is clear that arbitrations must be fundamentally fair, it is not clear what constitutes a fundamentally fair arbitration procedure.

With mounting public skepticism and lack of confidence in arbitration procedures, and the current explosion in litigation throughout the overburdened federal and state court systems, it is imperative that this Court establish guidelines for these quasi-judicial proceedings which so significantly affect individuals' rights and property. Arbitration provides an important, if not essential, alternative to litigating disputes in the federal courts. This case provides the opportunity for the Court not only to achieve a just result for the parties before it, but to

develop and promote effective alternative dispute resolution.

II. *THE WGA ARBITRATION PROCEDURE IS FUNDAMENTALLY UNFAIR AND PROVIDES NOTHING MORE THAN A SHAM HEARING AND REVIEW.*

Although courts give deference to arbitration awards, the rule "is not equivalent to granting limitless power to the arbitrator." *Georgia-Pacific Corporation v. Local 27, United Paperworkers International Union*, 864 F.2d 940, 944 (1st Cir. 1988). The courts do not forego logic, reason and sound principles of law to give unfettered discretion to arbitrators. *See Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990).

An arbitration award shall be set aside where the arbitration procedure is inadequate or fails to provide a fair hearing. *See Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1296 (9th Cir. 1982), *cert. denied*, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982). Thus, an arbitration proceeding must be a "fundamentally fair hearing." *Bell Aerospace Co. Div. of Textron, Inc., v. Local 516, UAQ*, 500 F.2d 921, 923 (2d Cir. 1974); *Totem Marine Tug & Barge v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979). Whether a party had a fair opportunity to be heard depends on "whether he was denied procedural, substantive or evidentiary opportunities" at the arbitration. *See Jeffers v. Convoy Company*, 636 F. Supp. 1337, 1339-40 (D. Minn. 1986).

A. *The WGA Precludes the Parties from Knowing the Identities, Qualifications, Partiality or Bias of the Arbitrators.*

It is established law that bias on the part of an arbitrator invalidates an arbitration award. *Sheet Metal Workers Association v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745-46 (9th Cir. 1985). Accordingly, the Federal Arbitration Act, 9 U.S.C. § 10 (b), provides for vacation of an award "where there was evident partiality or corruption in the arbitrators, or either of them."

In *Commonwealth Coatings*, *supra*, 393 U.S. at 150, the Court stated that arbitrations "not only must be unbiased, but also must avoid the appearance of bias." The Court stated: "We can perceive no way in which the effectiveness of the arbitration will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that *might create an impression of possible bias*" *Id.* at 149 (emphasis added).

Nevertheless, the WGA's rules prevent disclosure of not only the identities of the arbitrators, but also of "any dealings that might create an impression of possible bias." Consequently, the parties are prevented absolutely from ascertaining whether the arbitrators are biased or partial.

It is fundamental to our system of jurisprudence that the parties know who is judging them. Litigants have a right to know the identity of judges assigned to their actions, and have a right to a *voir dire* of jurors. Parties should have the same right in arbitrations. In *Commonwealth Coatings*, the Court wrote:

> "[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149.

The WGA's rules, in this regard, vitiate fundamental fairness. The concept of unbiased and impartial determinations of matters affecting the rights of individuals is of basic importance to any fair dispute resolution. The district court's conclusion that Marino was not denied a fundamentally fair hearing is inconsistent with *Commonwealth Coatings*. To the extent that the Ninth Circuit's opinion may imply that the WGA was not required to disclose the identities of the arbitrators to the parties, it also is inconsistent with *Commonwealth Coatings*.[7]

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[7] Although the Ninth Circuit based its holding on the concept of waiver, the court wrote that the WGA's policy of secrecy was supported by considerations such as the need for arbitrators to be free from the dangers of pressure, retaliation and litigation. *See* Appendix A, page A9. The WGA argued that it developed the rule of anonymity in the 1940's due to fear of retaliation on arbitrators. However, there is no evidence in the record of pressure or retaliation on arbitrators in the 1940s, the present, or at any other time. Indeed, there are other industries in which individuals arbitrating disputes between labor and management are subject to very real pressure and retaliation in the form of intimidation and violence. Yet, there is no authority which justifies denying the parties the right to know the arbitrators' identities on this, or any other, basis.

B. *The WGA Arbitration Procedure Deprives Its Members of a Hearing and a Meaningful Opportunity to Be Heard.*

The "universal rule" in arbitrations is that "the parties are entitled to be heard." *Citizens Bldg. of West Palm Beach, Inc., v. Western Union Tel. Co.*, 120 F.2d 982, 984 (5th Cir. 1941). The essence of a hearing is the right to present evidence, and to respond to the evidence presented by an adverse party. *Austin Mun. Securities v. Nat. Ass'n of Securities*, 757 F.2d 676, 691 (5th Cir. 1985) (Arbitration is an "adversarial process, providing a hearing" where the parties have the right to "present evidence" and "cross examine witnesses.") The WGA arbitration policy and practice deprive its members of both of these essential rights, thus violating union members' rights to a meaningful opportunity to be heard.

The WGA's arbitration system does not provide for a hearing. The issue is not just that there is no oral hearing before the arbitration panel, but that there is no process by which parties can offer all of the evidence necessary to support their cases, or hear and respond to their adversaries' cases.

It is axiomatic that a party cannot present his or her entire case, and cannot respond to the case of an adversary, where the party is unaware of the evidence submitted to the arbitrators. As a matter of law, arbitrators cannot receive evidence that is not disclosed to all of the parties. In *Totem Marine, supra*, the Fifth Circuit held that the parties were denied a fundamentally

fair hearing when the arbitrators received evidence *ex parte*: "Arbitrators cannot . . . receive evidence except in the presence of each other and the parties . . . ." 607 F.2d at 653.

In this case, there was no hearing and the WGA did not provide either party with the statements of the other. The arbitrators received that evidence *ex parte*. Consequently, the parties had no opportunity to respond to the evidence presented by the adverse party, and upon which the arbitrators based their decisions.

Furthermore, the right to be heard ordinarily includes a right to cross-examination. *See* 5 Wigmore, *Evidence*, § 1367 (Chadbourn rev. 1974). In a broad sense, cross-examination involves the opportunity to challenge an adversary's evidence. In this case, not only does the WGA arbitration procedure provide no hearing at which a member could cross-examine witnesses, but it does not even allow its members to see the evidence presented by adverse parties.

Furthermore, the WGA arbitration procedure prevents parties from presenting evidence to support their cases. The right to present evidence on issues of fact is a "basic right" in an arbitration. *See Cofinco, Inc. v. Bakrie & Bros. N.V.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975). Yet, the WGA's rules prevent a party from offering any evidence other than his arbitration statement. Hence, a party may not introduce expert testimony, admissions by an adverse party, testimony of third parties, or other written material relevant to the controversy.

Further, the WGA refused to submit Marino's 1987 treatment to the arbitrators. Consequently, the arbitrators could not evaluate the similarities between Marino's treatment and Coppola's and Puzo's work. The WGA thereby denied Marino an opportunity to offer relevant evidence, contrary to law and to the WGA's own arbitration rules.[8]

Finally, the arbitrators did not even review all the evidence which was before them. Refusal to hear pertinent and material evidence constitutes grounds for vacating an arbitration award, pursuant to the Federal Arbitration Act. 9 U.S.C. § 10(c). Thus, courts vacate arbitration awards "solely" because of an arbitrator's "failure to consider" relevant evidence. *Trailways Lines, Inc. v. Trailways, Inc. Joint Counsel*, 807 F.2d 1416, 1423 (8th Cir. 1986).

In this case, two of the three arbitrators voted against Marino. Both of those arbitrators failed to consider evidence which is material and pertinent to determining screen credit[9]. The arbitrators received thirty-four

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[8] The Screen Credits Manual further provides that if a dispute exists as to the "authenticity, identification, sequence, authorship or completeness of any literary material to be considered in a credit arbitration," the WGA shall conduct a hearing at which the parties may present testimony and documentary evidence. Yet, contrary to its own working rules, the WGA refused to conduct a hearing concerning Marino's 1987 treatment.

[9] Screen credit is determined by an evaluation of each writer's contribution to the final screenplay. Since Coppola was a production executive, he and Puzo had the burden of proving that the final screenplay was 60 percent original to them. An arbitrator cannot possibly

treatments and screenplays on which to base their decisions. The first arbitrator who voted against Marino flatly said he "did not read all thirty-three (sic) scripts." The second arbitrator, who voted against Marino, stated that he did not read "with great thoroughness the stuff which was not relevant." He did not say how he determined what was not relevant without reading the material thoroughly. Further, what he did read he read "with not great scrutiny." The WGA, upon learning these facts, still refused to order a new arbitration.

The Ninth Circuit analyzed the arbitrators' failure adequately to review the evidence in terms of the WGA's duty of fair representation. However, the arbitrators' failure to review all of the evidence constitutes grounds to vacate the arbitration award under the Federal Arbitration Act and under federal common law.

C. *Conclusion*

The WGA arbitration procedure falls far short of the minimum level of integrity necessary for any judicially sanctioned dispute resolution process. The procedure

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determine originality without reading all of the prior literary material. If, as occurred here, an arbitrator reads only Marino's work and Coppola's and Puzo's final screenplay, it will appear that anything which is contained in the final screenplay, but which is not contained in Marino's work, is original to Coppola and Puzo. That conclusion is wrong. All of the sequences, characterizations and dialogue which are based on any of the thirty-one screenplays and treatments written by other writers are not original to Coppola and Puzo. Thus, the failure to read thoroughly the other thirty-one literary materials causes Coppola and Puzo to receive credit for other writers' contributions, to Marino's prejudice.

violates principles which many people consider to be essential to a fundamentally fair hearing. People will refuse to submit substantial disputes to the vagaries and frustrations of such arbitration procedures. The Court should intercede to provide parties with the necessary assurance that the arbitrations will constitute fundamentally fair hearings, and to furnish appropriate standards of fairness and integrity to guide the lower courts.

III. *THE WGA VIOLATED ITS DUTY OF FAIR REPRESENTATION.*

The WGA owes a duty of fair representation to its members, including Marino. The WGA breached its duty in two important ways: first, the WGA adopted and implemented procedures for the arbitration which are arbitrary and discriminatory. In fact, the WGA created and implemented its procedures solely to promote and facilitate the administration of the union, at the expense of one of its member's interests. As this Court stated, in *Wooddell v. Intern. Broth. of Elect. Workers*, ___ U.S. ___, 116 L.Ed.2d 419, 429-430, 112 S.Ct. 494 (1991): "'Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based.'" (*quoting Smith v. Evening News Assn.*, 371 U.S. 195, 200, 9 L.Ed.2d 246, 83 S.Ct. 267 (1962)).

Second, the WGA breached its duty of fair representation by its arbitrary, discriminatory and bad faith

conduct, including its failure to follow its own working rules, and, in doing so, favoring well-known and prominent writers over less established members.

The Court should not countenance such conduct in the administration of quasi-judicial functions such as arbitrations among union members.

A. *The WGA Breached Its Duty of Fair Representation by Sanctioning Arbitrary and Discriminatory Arbitration Practices.*

A union owes each of its members a duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967). This duty requires that the union "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. A union breaches its duty when its conduct is "arbitrary, discriminatory, or in bad faith," as, for example, when it processes a grievance in a "perfunctory fashion." *Id.* at 190-91.

Moreover, "the Union must be careful to protect the interests of all members whom it represents." *Tenorio v. N.L.R.B.*, 680 F.2d 598, 602 (9th Cir. 1982). "The needs of the many do not always outweigh the needs of the few, or the one." *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1443 (9th Cir. 1989). On the contrary, the duty of fair representation is "calculated to ensure that individual rights of their members are not unduly sacrificed in the pursuit of group goals." *Id.* at 1441.

To satisfy its duty of fair representation, the WGA must ensure that its individual members receive a "fair judgment of the validity of [their] claims." *Id.* at 1443. The WGA breached its duty of fair representation because its arbitration procedures do not ensure that members receive a "fair judgment." *See generally* Section II, *supra*. The WGA's actions in the "Godfather III" arbitration were particularly egregious because the WGA failed even to follow its own policies and procedures. The WGA may not sacrifice the interests of its individual members in a credit arbitration just because it believes that its procedures are in the interest of the WGA as a whole.

B. *The WGA Breached Its Duty of Fair Representation by Its Arbitrary and Discriminatory Conduct.*

The Ninth Circuit erroneously concluded that Marino failed to show discrimination or bad faith on behalf of the WGA[10]. However, there is ample evidence of discriminatory and bad faith conduct by the WGA. In particular, this is evidenced by the WGA's denial of Marino's right to preserve the writers' anonymity. The Ninth Circuit recognized that if Marino requested that the writers be anonymous, it would violate the WGA's rules to deny such anonymity. *See* Appendix A, page A16.

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[10] In connection with the WGA's motion for summary judgment, the issue is not whether Marino affirmatively showed discrimination or bad faith. Rather, the issue is whether, viewing the evidence in a light most favorable to Marino, there was any genuine issue of material fact as to a breach of the WGA's duty of fair representation. *See Tzung v. State Farm Fire & Casualty Company*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

In fact, Marino made four separate requests to maintain the anonymity of the writers. In response, the WGA's Screen Credits Coordinator informed Marino that the writers' identities would not be kept anonymous since "Francis" (i.e. Francis Coppola) had already submitted his statement identifying him as one of the participating writers. Thus, the WGA intentionally refused to maintain the anonymity of the writers.

The WGA also unfairly prevented Marino from submitting his 1987 treatment, and refused to conduct a pre-arbitration hearing on that issue. The element of bad faith is manifest from the reasons underlying the WGA's conduct. The WGA receives money when a member's work is purchased or optioned. The WGA refused to allow Marino to submit his 1987 treatment, which he sent to Coppola before Coppola wrote his script, because it was neither purchased nor optioned. Accordingly, the WGA did not receive any payment in connection with that work. Its refusal to submit this evidence was thus due to the WGA's financial interest, which is irrelevant to the factors at issue in credit determination.

Furthermore, the WGA's rules --and federal law-- require that the arbitrators read all of the literary material, by all of the writers, before making their determination. It is undisputed that the two arbitrators who voted against Marino, and in favor of Coppola and Puzo, did not do so. Yet, contrary to its own rules, the WGA refused to conduct a new arbitration.

Throughout the arbitration process, the WGA discriminated in favor of Coppola and Puzo, who are well-known writers, and acted in bad faith toward Marino, who was not a well-known writer.[11]

IV. *WAIVER DOES NOT APPLY WHERE IT WOULD HAVE BEEN FUTILE TO OBJECT TO THE ARBITRATION PROCEDURE.*

The Ninth Circuit erroneously affirmed summary judgment on the theory that Marino waived the right to attack the WGA's arbitration procedures. The Ninth Circuit's decision is inconsistent with Supreme Court authority, and decisions from other circuits. Moreover, it is not based on any evidence.

A party does not waived an objection where such an objection would be futile. *Glover v. St. Louis-San Francisco Railway Company*, 393 U.S. 324, 329-31, 21 L.Ed.2d 519, 89 S.Ct. 548 (1969); *see also Kitchen Fresh, Inc. v. N.L.R.B.*, 716 F.2d 351, 357 (6th Cir. 1983) ("[A]ny objection before the Board would be futile"

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[11] For example, the Screen Credits Coordinator selected the arbitrators and gave them their instructions. During the course of the arbitration, she failed to return telephone calls from Marino. Although Marino requested that she document all communications to him in writing, she refused to do so. In addition, she facetiously told Marino that she would have to review his arbitration statement to make sure that Marino did not claim to have written "Gone With the Wind." Furthermore, in breach of the WGA's rules, she did not require one of the arbitrators to confirm that decision in writing. The WGA also allowed the tentative credit to go into effect before the arbitration in violation of WGA rules and the MBA. Marino asked the WGA to replace the Screen Credits Coordinator, but the WGA refused to do so.

since the "futility of such an objection" "excuses the petitioner's failure to object to the state of the record"); *United Transportation Union v. Consolidated Rail Corp.*, 881 F.2d 282, 289 (6th Cir. 1989), *vacated on other grounds*, 494 U.S. 1051, 108 L.Ed.2d 757, 110 S.Ct. 1517 (1990) (""[F]utility is an excuse for failure to exhaust internal union remedies. Specifically, employees need not resort to internal union remedies if it would be futile to do so . . . .")

Here, the evidence is undisputed that it would have been futile for Marino to object to the arbitration procedures in issue. The Assistant Executive Director of the WGA testified at her deposition that even if a writer requested that the WGA disclose the arbitrators' names or the adverse party's statement, the WGA would refuse to do so. Further, if the writer objected to the arbitration going forward, the WGA would proceed with the arbitration anyway.

Thus, it would have been futile for Marino to object and, consequently, there can be no waiver. Indeed, there is no evidence in the record to the contrary[12].

Moreover, waiver is an affirmative defense which must be proved by the WGA. *See Sellers v. M. C. Floor Crafters, Inc.*, 842 F.2d 639, 642, n.2 (2d Cir. 1988). In particular, the WGA has the burden of proving "the

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[12] Hence, there is, at least, a genuine issue of material fact as to whether an objection to the WGA's arbitration procedure would have been futile. This alone warrants remanding the case for a determination of this issue on the merits.

availability of adequate internal union remedies." *Beyene v. Coleman Securities Services, Inc.*, 854 F.2d 1179, 1183 (9th Cir. 1988). The WGA offered no evidence that Marino failed to object to the WGA's refusal to disclose the identities of arbitrators, or that adequate internal union remedies were available. There simply is no such evidence in the record. To the contrary, at the first, and only, hearing conducted by the WGA (i.e. the Policy Review Board), Marino requested the identity of the arbitrators, and objected to the arbitration on the grounds that the identities of the arbitrators had not been disclosed.

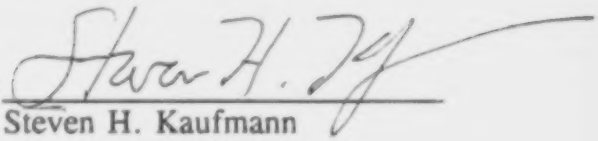
Thus, the Ninth Circuit erred. Marino did not waive the issue of fundamental fairness of the WGA's arbitration procedure. The Ninth Circuit improperly affirmed summary judgment by ignoring significant questions of material fact, and Supreme Court precedent.

If parties to arbitrations, not represented by counsel, are held to lose fundamental rights of procedural fairness because they do not make technical, futile, and formal objections at --what is deemed, with hindsight, to be-- the proper time, they undoubtedly will be discouraged from availing themselves of this alternative form of dispute resolution. It is essential, in developing alternative dispute resolution, that people be assured of their rights to fundamental fairness.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

By: 

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